IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMERICAN FAMILY INSURANCE COMPANY,	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:16-CV-04023-RWS
ABDULMOHSEN ALMASSUD AND LUISA CRUZ MEZQUITAL,	)	
Defendants.	)	

DEFENDANT LUISA CRUZ MEZQUITAL'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW

American Family Insurance Company's Declaratory Judgment Action should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for Plaintiff's failure to state a claim upon which declaratory relief can be granted. Specifically, pursuant to the nine factors outlined in Ameritas Variable Life Insurance Co. v. Roach, 411 F.3d 1328 (2005), which guide a district court's decision whether or not to exercise jurisdiction over a declaratory judgment action, this action should be dismissed because: 1) it involves issues only important to the state of Georgia; 2) it would not settle the controversy as to whether Plaintiff is liable for the underlying Judgment; 3) because it would not settle the controversy, it would not serve a useful purpose in clarifying the legal relations at issue; 4) this action was brought merely to preempt a potential bad-faith claim for Plaintiff's failure to settle the claims against Defendant Almassud within his policy limits when Plaintiff had the opportunity; 5) this action in federal court could potentially have a completely opposite outcome than it would if filed in the state of Georgia, which causes friction between the federal and state courts; 6) there is an alternative remedy reducing litigation which would be for Plaintiff to raise the issues in this action as defenses in any bad-faith litigation which might be filed by Defendants; 7) the factual issues contained within are the same as would be raised in any bad-faith action filed by Defendants, so the issues need not be resolved in a declaratory judgment action; 8) all aspects of the underlying litigation and the insurance contract at issue are governed by Georgia law, so Georgia courts would be in a better position to evaluate the contract issues involved; and 9) all facets of the underlying motor vehicle collision case and the possible bad-faith case based on the insurance contract between Defendant Almassud and Plaintiff are governed by Georgia law, and, therefore, are important to Georgia's public policy considerations. As such, based on the factors contained in Ameritas, this Declaratory Judgment action which was filed merely as an attempt by Plaintiff to gain an advantage in litigation, should be dismissed.

I. FACTS

Plaintiff's purported Declaratory Judgment Action arises out of a Judgment that was entered in an underlying motor vehicle collision case styled Luisa Cruz Mezquital v. Abdulmohsen Almassud, et al., that was tried in the State Court of Fulton County. Every aspect of the underlying case involves the state of Georgia and, as a result, could not have been filed in federal court. Specifically, the subject collision occurred on October 21, 2012, between two Georgia residents, Defendant Almassud and Defendant Mezquital. The collision occurred on Georgia State Route 9, which is also known as Dahlonega Street, in Forsyth County, Georgia. After the crash, Defendant Mezquital underwent six (6) surgeries all performed in the state of Georgia and incurred approximately $400,000.00 in medical expenses in the state of Georgia. Moreover, the contract of insurance entered into between Plaintiff and Defendant Almassud was delivered in the state of Georgia, and, therefore, it is governed by Georgia law. See, e.g., Avemco Insurance Co. v. Rollins, 380 F.Supp. 869, 872 (N.D. Ga. 1974). Therefore, every aspect of the underlying case is governed by Georgia law.

Furthermore, the underlying action is still pending. After the Judgment was entered, Defendant Almassud filed a Motion for New Trial on October 20, 2016 (See

Exh. F of Complaint). That Motion still pends in the State Court of Fulton County, awaiting a hearing. If that Motion is granted, the case will be tried again in the State Court of Fulton County.

Plaintiff is purportedly seeking declaratory relief due to claimed violations of the insurance contract between Defendant Almassud and Plaintiff that allegedly were brought to light during the trial. (See Complaint). Trial in the underlying case began on September 6, 2016, and concluded on September 13, 2016, with a verdict issued in excess of Defendant Almassud's policy limits. The Judgment was subsequently entered on September 22, 2016. (See Exh. D to Plaintiff's Complaint). Since Plaintiff does not wish to pay the Judgment, Plaintiff is now claiming it was prejudiced by Defendant Almassud's testimony and requires a declaration from this Court that it is not liable for the Judgment. However, that is not the true motive behind the filing of this action; Plaintiff filed this action merely to gain an advantage by being the first to file. Specifically, Plaintiff anticipated that Defendants would file a contract action (which Defendant Mezquital is now forced to do as a Counterclaim) seeking damages for Plaintiff's bad-faith and/or negligent refusal to settle when it had the opportunity to do so within Defendant Almassud's policy limits. Based on the bad faith actions which could be filed against Plaintiff, Plaintiff's claims in this purported action for declaratory relief could be brought as defenses to the claims based in contract rather than as procedural fencing to preempt Defendants' claims. Quite simply, Plaintiff only filed first so that the insurer would be the "plaintiff" rather than the "defendant," and not because Plaintiff actually believes there is an actual controversy regarding coverage. Accordingly, Plaintiff's Complaint for Declaratory Judgment should be dismissed, and this action should be re-organized and proceed with Defendants becoming the Plaintiffs and this action becoming a contract action against American Family Insurance Company for its failure to settle the underlying lawsuit within Defendant Almassud's policy limits.

II. STANDARD OF REVIEW FOR DISMISSAL OF DECLARATORY JUDGMENT ACTIONS

The dismissal of a complaint for declaratory judgment will only be reversed if the trial court abused its discretion. Wilton v. Seven Falls Co., 515 U.S. 277, 289-90, 115 S. Ct. 2137 (1995). Further, "the Declaratory Judgment Act has been understood to confer on federal courts ***unique and substantial discretion*** in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S. Ct. 2137, 2142, 132 L. Ed. 2d 214 (1995) (emphasis added).

III. MEMORANDUM OF LAW AND CITATION OF AUTHORITY

A. This Court Should Exercise Its Substantial Discretion and Dismiss this Declaratory Judgment Action As Guided by the *Ameritas* Factors.

The Federal Declaratory Judgment Act provides as follows: "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, ***may*** declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C.A. § 2201(a) (emphasis added). "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." Public Affairs Associates v. Rickover, 369 U.S. 111, 112, 82 S. Ct. 580, 581, 7 L. Ed.2d 604 (1962).

This Court should dismiss Plaintiff's declaratory judgment action based on the balancing factors defined in Ameritas Variable Life Insurance Co. v. Roach, 411 F.3d 1328 (2005). Specifically, in Ameritas, the following factors were provided to assist district courts in deciding whether to exercise jurisdiction over declaratory judgment actions:

> (1) the strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts;
>
> (2) whether the judgment in the federal declaratory action would settle the controversy;
>
> (3) whether the federal declaratory action would serve a useful purpose in clarifying the legal relations at issue;
>
> (4) whether the declaratory remedy is being used merely for the purpose of "procedural fencing"—that is, to provide an arena for a race for res judicata or to achieve a federal hearing in a case otherwise not removable;
>
> (5) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction;
>
> (6) whether there is an alternative remedy that is better or more effective;
>
> (7) whether the underlying factual issues are important to an informed resolution of the case;
>
> (8) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and
>
> (9) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action.

Ameritas, 411 F.3d at 1331. When analyzing these factors, dismissal is appropriate.

As noted in the Facts section of this Motion, the underlying case involved a collision in Georgia between two Georgia residents. The insurance policy issued to Defendant Almassud by Plaintiff was a policy issued in the State of Georgia and, therefore, is governed by Georgia law. All relevant issues in the pending litigation in the State Court of Fulton County are subject to Georgia law, not federal law. Additionally, if this declaratory judgment action had been filed in a Georgia court, rather than federal court, it would have been dismissed pursuant to the Georgia Supreme Court case of Morgan v. Guar. Nat. Companies, 268 Ga. 343, 489 S.E.2d 803 (1997). (Morgan is more thoroughly described in the section below). The fact that Georgia courts would be bound to dismiss this action while a federal court might not, causes friction between the state and federal courts. As such, even though the contract of insurance at issue in this case is governed by Georgia law, Plaintiff brought this in federal court to avoid Georgia *stare decisis*. Therefore, factors 1, 5, 8, and 9 balance toward dismissal.

Moreover, a judgment in this declaratory judgment action would ***not*** settle the controversy, and, therefore, would not serve a useful purpose, balancing factors 2 and 3 toward dismissal. If Plaintiff prevailed in this matter, Defendants would still seek to prove that, on at least three occasions prior to trial, Defendant Mezquital tried to settle the underlying matter for Defendant Almassud's policy limits of $100,000.00 and that by refusing, Plaintiff acted in bad faith. That litigation would still occur, and a declaration in this Court would not prevent or preclude that litigation since, on all of those occasions, Plaintiff was acting as the agent for Defendant Almassud and was not claiming the contract of insurance did not apply.

Finally, the remaining factors numbered 4, 6, and 7 also balance toward dismissal. Quite simply, this declaratory judgment action was filed merely to gain a procedural advantage. Specifically, Plaintiff expected that, after the underlying case was finally resolved, a bad-faith action would be filed by Defendants against Plaintiff for its failure to settle the underlying action within Defendant Almassud's policy limits. Every issue raised in Plaintiff's Complaint for Declaratory Judgment will be determined by Georgia contract law just as it would in any bad-faith litigation. Instead of waiting for that litigation to arise, Plaintiff filed this action merely to beat Defendants to the punch to gain a procedural advantage. Plaintiff's claims made here could and should be made as Plaintiff's defenses. Seeking relief via declaratory judgment is ultimately a waste of judicial resources when the action can be fully and completely resolved in the event of the filing of a bad-faith claim against Plaintiff for its failure to settle the underlying action.

For further examination of the application of these factors, the case of Penn Millers Ins. Co. v. AG-Mart Produce, Inc., 260 Fed. Appx. 175 (11th Cir. 2007), is instructive due to the procedural similarities it shares with the instant case. In Penn Millers Ins. Co. the Eleventh Circuit Court of Appeals upheld the dismissal of the declaratory judgment action filed by Penn Millers Insurance Company ("PMIC") based on the trial court's application of the Ameritas factors. Id. In that case, PMIC filed a declaratory judgment action in federal court while the underlying tort claim was still pending. Id. In the underlying tort claim, PMIC was defending the two named defendants in relation to a motor vehicle collision wherein the defendant-driver was allegedly drunk when the collision occurred. Id. PMIC sought declaratory relief in federal court to obtain a ruling that PMIC could not be held liable for punitive damages which were being claimed in the underlying state court suit. Id. The Court of Appeals held that the district court had properly weighed the factors from Ameritas, supra, and, therefore, upheld the dismissal of the declaratory judgment action. Id.

In the present case, Defendant Mezquital's action against Plaintiff's insured, Defendant Almassud, remains ongoing due to Defendant Almassud's Motion for New Trial. (See Exh. E of Complaint). In fact, Plaintiff is funding that effort and paying the attorneys representing Defendant Almassud. If Defendant Almassud's Motion for New Trial is granted, a new trial will proceed in the State Court of Fulton County. However, if the Motion is denied, either Defendant Almassud will appeal the ruling or the Judgment will become ripe for collection, and Defendants' action against Plaintiff may proceed if the matter is not settled. As such, like Penn Millers Ins. Co., the underlying matter still pends in the State Court of Fulton County, Georgia, and requires resolution. In balancing those facts against the factors in Ameritas, the Eleventh Circuit Court of Appeals upheld the dismissal. Accordingly, like Penn Millers Ins. Co., this action for declaratory relief should be dismissed based on the Ameritas factors.

B. This Matter Should Be Dismissed Based on the Reasoning of Georgia Supreme Court Case, *Morgan v. Guaranty National Companies.*[1]

Although not binding authority on this Court, the Georgia Supreme Court case of Morgan v. Guar. Nat. Companies, 268 Ga. 343, 345, 489 S.E.2d 803, 805–06 (1997), provides further reasoning for the dismissal of Plaintiff's Complaint for Declaratory Judgment under Fed. R. Civ. P. 12(b)(6). Georgia's Declaratory Judgments Act provides that its purpose is"to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. Although the language of Georgia's rule differs from the federal statute, 28 U.S.C. § 2201, Georgia's rule is actually describing an actual controversy relating to uncertainty or insecurity regarding rights and legal relations, which is not contrary to 28 U.S.C. § 2201. As such, the reasoning in the Georgia Supreme Court case of Morgan provides compelling persuasive authority that Plaintiff's Complaint for

[1] Defendant Mezquital recognizes there are numerous cases that hold that state law does not govern the justiciability of the federal Declaratory Judgment Act. However, Defendant Mezquital believes the reasoning in Morgan is instructive as to whether an actual controversy exists as defined by federal law, and, therefore, believes it to be a relevant discussion as to whether this matter should be dismissed in the discretion of this Court.

Declaratory Judgment should be dismissed in this Court's reasonable exercise of its discretion.

In Morgan, the insurer refused to defend its insured in the underlying car wreck case. After a judgment was entered, the insurer filed a declaratory judgment action in a Georgia state court. Id. The Supreme Court of Georgia upheld the dismissal of the declaratory judgment action, holding that "[a]n insurer may not refuse to pay [under its policy] and then use declaratory judgment procedure as a means of avoiding bad faith penalties." Morgan at 344, 489 S.E.2d 803, 805 (1997) (citations and punctuation omitted). The Supreme Court of Georgia explained its analysis as follows:

> "[A] judgment has been obtained against an insurer's putative insured, and the insure[r] now seeks a declaratory judgment that it is not liable under the policy. All rights have accrued; the [insurer] is either liable under the terms of its policies for the judgment entered against [its insured] or it is not. **The [insurer] faces no risk of taking future undirected action; its defenses can be presented when suit is entered by the third-party claimant. Therefore, the dismissal of [the insurer's declaratory action] petition, which sought a mere advisory opinion as to its defenses, was proper."** ***Thus, under the facts present in this case, the appropriate procedural vehicle is not a declaratory judgment action by [the insurer] but a breach of contract suit by the putative insured or putative third party claimant . . .***

Morgan v. Guar. Nat. Companies, 268 Ga. 343, 345, 489 S.E.2d 803, 806 (1997) (internal citations omitted), quoting Shield Ins. Co. v. Hutchins, 149 Ga. App. 742, 744-745(2), 256 S.E.2d 108 (1979).

Like Morgan, Plaintiff, in this case, brought this suit preemptively "merely to test the viability of its defenses." Morgan at 345, 489 S.E.2d at 805-806. As such, under Georgia law, Plaintiff's action clearly is barred by Morgan, which is surely one of the primary reasons Plaintiff brought this action in federal court. However, the reasoning underlying the Morgan opinion applies as easily to the federal Declaratory Judgment Act as it does to Georgia's. Morgan essentially holds there is no "actual controversy."[2] By holding that "where the rights of the parties have already accrued," there is no need for declaratory judgment because the relief sought is merely "advisory," Morgan is holding there is no actual controversy. Morgan at 344, 489

[2] In federal court, before entertaining a declaratory judgment action, the Court must find that the situation presents a justiciable case or controversy. An actual controversy exists where "there must be a substantial continuing controversy between parties having adverse legal interests." Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985) Moreover, "[t]he plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Malowney v. Fed. Collection Deposit Grp., 193 F.3d 1342, 1347 (11th Cir. 1999). "Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury." Id. "The remote possibility that a future injury may happen is not sufficient to satisfy the 'actual controversy' requirement for declaratory judgments." Id. (citations omitted).

S.E.2d at 805 (1997). Like the insurer in Morgan, every allegation in Plaintiff's Complaint for Declaratory Judgment can be raised and adjudicated in a bad-faith-refusal-to-pay case. Plaintiff only brought this action now in federal court, while the underlying action still pends, as a way to procedurally fence and obtain a ruling prior to the filing of any bad-faith claims that might be pursued. In line with the reasoning of Morgan, Plaintiff's Complaint for Declaratory Judgment should be dismissed for failure to state a claim by failing to present an "actual controversy" pursuant to 28 U.S.C. 2201. Accordingly, Defendant Mezquital requests that this Court utilize the same reasoning it did in Alliant Tax Credit Fund 31-A, Ltd. v. Murphy, No. 1:11-CV-832-RWS, 2012 WL 887589, wherein this Court dismissed a Counterclaim for Declaratory Judgment citing Morgan as authority, and quoting it as follows: "where the rights of the parties have already accrued and there are no circumstances showing any necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest, the plaintiff is not entitled to a declaratory judgment. [Cit.] The declaratory judgment action makes no provision for a judgment which is advisory.)." Alliant Tax Credit Fund 31-A at p. 7.

Accordingly, Defendant Mezquital respectfully requests that this Court dismiss Plaintiff's Complaint for Declaratory Judgment.

IV. CONCLUSION

Based on the foregoing, Defendant Mezquital respectfully requests that this Court use its substantial discretion and dismiss Plaintiff's Complaint for Declaratory Judgment, leaving only the adjudication of any Counterclaims that may be filed.

This 1st day of December, 2016.

Respectfully submitted,

s/ Ashley B. Fournet

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LOCAL RULE 7.1D CERTIFICATE

This is certify that the foregoing pleading was prepared using Times New Roman 14 point font in accordance with Local Rule 5.1C.

By: /s Ashley B. Fournet
Ashley B. Fournet

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Defendants.	)	
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CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel of record for all other parties with a copy of **DEFENDANT LUISA CRUZ MEZQUITAL'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

David M. Atkinson, Esq.
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I further certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Mr. Abdulmohsen Almassud
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Alpharetta, GA 30009

This 1st day of December 2016.

Respectfully submitted,

s/ Ashley B. Fournet

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